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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 FERNANDO F. AGUIRRE-URBINA,

12 Petitioner,

13 v.

14 NATALIE ASHER, USCIS Field Office
15 Director, Northwest Immigration Detention
16 Center,

17 Respondent.

CASE NO. 16-5935 RJB JRC

ORDER ADOPTING REPORT AND
RECOMMENDATION

18 This matter comes before the Court on the Report and Recommendation of U.S.
19 Magistrate Judge J. Richard Creatura. Dkt. 22. The Court has considered the Report and
20 Recommendation, Petitioner's objections, if any, and the remaining file.

21 This case was filed on November 8, 2016, and seeks relief from Petitioner's 2012 state
22 court conviction of drug related charges to which he pled guilty. Dkt. 1. He asserts that his
23 guilty plea to those charges was not valid because it was not knowing and voluntary in violation
24 of the Sixth Amendment to the U.S. Constitution due to his mental incompetence and he asserts
that the state courts failed to follow procedural rules when they denied him a hearing. Dkt. 3.

1 Petitioner served his sentence on this conviction and was released from state custody on
2 September 6, 2012. *Id.* Petitioner is now held at the NW Detention Center in Tacoma,
3 Washington on immigration related charges. Dkt. 3. The remaining facts are contained in the
4 Report and Recommendation (Dkt. 22, at 1-4) and are adopted here. Petitioner was granted in
5 forma pauperis (“IFP”) status on November 17, 2016. Dkt. 2.

6 On April 12, 2017, the Report and Recommendation was issued, recommending that the
7 Petition be dismissed because the Petitioner is not “in custody” regarding the state court
8 convictions, so, this Court lacks jurisdiction under 28 U.S.C. § 2254 to consider the petition.
9 Dkt. 22. (Although the Petition cites 28 U.S.C. § 2241, it attacks Petitioner’s state court
10 conviction, and so the Report and Recommendation properly construed the Petition under 28
11 U.S.C. § 2254). The Report and Recommendation also recommended that a certificate of
12 appealability not issue. Dkt. 22. Petitioner’s motion for an extension of time to file objections
13 was granted and the Report and Recommendation was renoted for consideration on May 12,
14 2017. Dkt. 24. Petitioner did not file objections. The Report and Recommendation is now ripe
15 for consideration.

16 **Report and Recommendation.** The Report and Recommendation (Dkt. 22) should be
17 adopted. As provided in the Report and Recommendation, Petitioner is not “in custody”
18 pursuant to a state court judgment, but is in federal custody on immigration related charges. This
19 Court does not have jurisdiction to consider his Petition under 28 U.S.C. 2254. Further, it is not
20 clear that Petitioner’s petition is timely under 28 U.S.C. § 2244(d). This case should be
21 dismissed.

22 **Certificate of Appealability.** The district court should grant an application for a
23 Certificate of Appealability only if the petitioner makes a “substantial showing of the denial of a
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1 constitutional right.” 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28
2 U.S.C. § 2253(c), a habeas petitioner must make a showing that reasonable jurists could debate
3 whether, or agree that, the petition should have been resolved in a different manner or that the
4 issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*,
5 529 U.S. 473, 484 (2000).

6 As recommended in the Report and Recommendation, a Certificate of Appealability
7 should not issue in this case. Petitioner has not shown that this court has jurisdiction over this
8 case. He has not made a substantial showing of the denial of a constitutional right. Reasonable
9 jurists could not debate whether, or agree that, the petition should have been resolved in a
10 different manner; the issues raised are not adequate to deserve encouragement to proceed further;
11 and jurists of reason would not find it debatable whether the court was correct in its rulings. A
12 Certificate of Appealability should be denied.

13 **IFP on Appeal.** In the event that Petitioner appeals this order, and/or appeals dismissal
14 of this case, IFP status should be denied by this court, without prejudice to Petitioner to file with
15 the Ninth Circuit U.S. Court of Appeals an application to proceed IFP.

16 **IT IS ORDERED that:**

- 17 • The Report and Recommendation (Dkt. 22) **IS ADOPTED**;
- 18 • This case **IS DISMISSED**;
- 19 • The Certificate of Appealability **IS DENIED**; and
- 20 • In the event that Petitioner appeals this order, and/or appeals dismissal of this
21 case, IFP status **IS DENIED** by this Court, without prejudice to Petitioner to file
22 with the Ninth Circuit U.S. Court of Appeals an application to proceed IFP.

1 The Clerk is directed to send uncertified copies of this Order to Judge J. Richard
2 Creatura, all counsel of record and to any party appearing pro se at said party's last known
3 address.

4 Dated this 15th day of May, 2017.

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7 ROBERT J. BRYAN
8 United States District Judge
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